88-2074

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MARK FRECH, *et al.*,

Cross-Petitioners,

v.

CYNTHIA RUTAN, *et al.*,

Cross-Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the alleged denials of promotion, transfer or rehire have a sufficient effect on the First Amendment rights of public employees to properly state a claim, where the challenged employment decisions are non-punitive and substantially, but not wholly, based on broadly defined "political considerations."

LIST OF PARTIES

The parties to the proceedings in the Seventh Circuit were:

Cross-Petitioners:

MARK FRECH, GREG BAISE, WILLIAM FLEISCHLI, RANDY HAWKINS, KEVIN WRIGHT, JAMES REILLY and LYNN QUIGLEY, individually and in their official capacities, JAMES R. THOMPSON, individually and as Governor of the State of Illinois; the Republican Party of Illinois, the Republican Party of each county of Illinois, Don W. Adams and Irvin Smith.[1]

Cross-Respondents:

CYNTHIA RUTAN, FRANKLIN TAYLOR, RICKY STANDEFER and DAN O'BRIEN.[2]

[1] Counsel for the Republican Party of Illinois, the Republican Party of each county of Illinois, Don W. Adams and Irvin Smith have indicated that they intend to adopt this Cross-Petition, which is filed on behalf of Cross-Petitioners Frech, Baise, Fleischli, Hawkins, Wright, Reilly, Quigley and Thompson.

[2] James Moore was also a party to the proceedings below but he has no interest in the outcome of this Cross-Petition.

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Cross-Petitioners, MARK FRECH, GREG BAISE, WILLIAM FLEISCHLI, RANDY HAWKINS, KEVIN WRIGHT, JAMES REILLY, LYNN QUIGLEY and JAMES R. THOMPSON, respectfully pray that—solely in the event that a writ of certiorari issues to review one or more of the questions presented in No. 88-1872—a writ of certiorari issue to review one additional aspect of the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in the above-entitled proceedings.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit, on rehearing *en banc*, is reported at 868 F.2d 943 (7th Cir. 1989), and is reprinted in the Appendix to the petition for a writ of certiorari ("the Petition") in No. 88-1872, at A-1. The initial panel opinion of the Court of Appeals for the Seventh Circuit is reported at 848 F.2d 1396 (7th Cir. 1988), and is reprinted in the Appendix to the Petition at B-1. The decision and opinion of the United States District Court for the Central District of Illinois is reported at 641 F. Supp. 249 (C.D. Ill. 1986), and is reprinted in the Appendix to the Petition at C-1.

JURISDICTION

On July 11, 1986, the United States District Court for the Central District of Illinois dismissed plaintiffs' complaint in its entirety with prejudice. 641 F. Supp. at 259; (C-17). On June 8, 1988, the United States Court of Appeals for the Seventh Circuit filed an opinion affirming the district court decision in part, reversing in part, and remanding for further proceedings. 848 F.2d at 1397; (B-1). On February 16, 1989, the Seventh Circuit, on rehearing *en banc*, adopted the panel opinion. 868 F.2d 943; (A-1). Thereafter, on May 17, 1989, plaintiff Moore and Cross-Respondents Rutan and Taylor filed the Petition in No. 88-1872, invoking the jurisdiction of this Court under 28 U.S.C. § 1254(1). Cross-Petitioners received the Petition on May 20, 1989, and now file this Cross-Petition invoking the jurisdiction of this Court under 28 U.S.C. § 1254(1) and Supreme Court Rule 19.5.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution, U.S. Const. amends. I and XIV, § 1. These provisions are quoted in full at page 3 of the Petition and, to avoid undue repetition, are incorporated herein by reference.

STATEMENT OF THE CASE

To avoid undue repetition, Cross-Petitioners refer the Court to and incorporate herein pages 2-9 of the State Respondents' Brief in Opposition to the Petition for Writ of Certiorari in No. 88-1872. In addition, Cross-Petitioners add the following facts pertinent to the claims of Cross-Respondents Standefer and O'Brien.

Cross-Respondent Standefer alleges that he was hired in a temporary position in the Spring of 1984 and, along with five other employees, was laid off several months later in November 1984. (R.A. 15, ¶ 21a, b.)[3] Standefer claims that the other five individuals "had the support of the Republican Party" and received new offers for state employment, but that Standefer—who allegedly once had voted in the Democratic primary at some unstated time in the past—did not receive another offer. (R.A. 15, ¶ 21c-e.)

[3] The complaint is reprinted in the Respondents' Appendix ("R.A.") to the State Respondents' Brief In Opposition, at R.A. 1-26.

Cross-Respondent O'Brien alleges that he was laid off from a state job in April 1983, after 12 years of state employment. (R.A. 15-16, ¶ 22a, b.) O'Brien claims that he was not recalled to his previous position, and that several months later he received another state job with less seniority and salary after obtaining the support of the Chairman of the Republican Party of Logan County. (R.A. 16, ¶ 22d, e, g.)

Neither Standefer nor O'Brien allege that their separations were in any manner related to political considerations. Nor do they allege that they were more qualified than other individuals who were offered other state employment or recalled from layoff, or that those other individuals were unqualified under the Illinois Personnel Code. *Ill. Rev. Stat.* ch. 127, ¶ 63b101, *et seq.* (1985).

The district court dismissed the claims of Standefer and O'Brien. *Rutan*, 641 F. Supp. at 253; (C-5). As with the hiring, promotion and transfer claims of the other plaintiffs, the district court found that the claims of Standefer and O'Brien did not "support a scenario of punitive actions based solely upon political belief." 641 F. Supp. at 255-56; (C-11).

The Seventh Circuit reversed the district court's dismissal of the claims of Standefer and O'Brien, and remanded for further proceedings. *Rutan*, 868 F.2d at 954; (A-23-24). The Seventh Circuit held that the failure to recall or rehire does not in and of itself violate the rule enunciated in *Elrod v. Burns*, 427 U.S. 347 (1976), as many laid-off employees "will stand essentially in the position of new job applicants when they seek a position." 868 F.2d at 956; (A-27). Nonetheless, the Seventh Circuit remanded the claims for a determination whether the alleged failure to offer Standefer another position or to

recall O'Brien to his former job were the "substantial equivalent of dismissal" and thus actionable under the First Amendment. 868 F.2d at 956-57; (A-27-29).

REASONS FOR GRANTING THE WRIT ON THE CROSS-PETITION IF THE WRIT IS GRANTED ON THE PETITION

In the State Respondents' Brief In Opposition ("State Resp. Br."), we demonstrate that review of the Seventh Circuit's decision in this case is unwarranted. The Seventh Circuit's decision is not in conflict either with decisions of this Court or with decisions of other Courts of Appeal. (State Resp. Br. at 11-25.) In addition, the interlocutory posture of the non-hiring claims creates the possibility that the promotion and transfer claims of Petitioners Rutan and Taylor could be rendered moot by further proceedings in the district court, another consideration that strongly counsels against granting the writ. (State Resp. Br. at 25 n.16.)

However, if this Court grants review, we ask the Court to review a question which is encompassed by the broadly framed questions set forth in the Petition, but on which Cross-Petitioners would seek a ruling different from that issued by the Seventh Circuit: whether Cross-Respondents' allegations of non-punitive denials of promotion, transfer and rehire, based in part on broadly defined "political considerations," are sufficient to state a cause of action under the First Amendment and 42 U.S.C. § 1983. As with non-punitive denials of employment, the use of such "political considerations" in these other employment

decisions does not state a constitutional claim. Accordingly, if the Court grants review, Cross-Petitioners ask that the Court reinstate the district court decision dismissing the promotion, transfer and rehire claims of Cross-Respondents Rutan, Taylor, Standefer and O'Brien.

In Part I, we show that the *Elrod* analysis does not prohibit the non-punitive use of political considerations in contexts other than dismissals. In Part II, we show that prudential considerations militate strongly against converting every employment decision into a constitutional issue, and thus injecting the judiciary further into the political process.

I.

THE NON-PUNITIVE USE OF POLITICAL CONSIDERATIONS IN EMPLOYMENT DECISIONS OTHER THAN DISMISSAL DOES NOT STATE A CONSTITUTIONAL CLAIM.

In *Elrod v. Burns*, 427 U.S. 347 (1976), this Court recognized that patronage practice runs afoul of the First Amendment only "to the extent it compels or restrains belief and association." *Id.* at 357. In *Elrod*, the Court found that a dismissal or threat of dismissal from existing employment based solely on partisan reasons "unquestionably inhibits protected belief and association" and "penalizes its exercise," and thus raises a constitutional issue. *Id.* at 359.

The allegations of Cross-Respondents in this case are vastly different from the claims presented in *Elrod*. Unlike *Elrod*, there is no allegation that Cross-Respondents were punished for their political beliefs; rather, it is alleged only that they "did not receive some favorable employment decisions" as an incidental effect of the non-

punitive use of political considerations. *Rutan*, 868 F.2d at 947, 954 n.4; (A-8, 23 n.4); 641 F. Supp. at 255-56, 57; (C-11, 13). Unlike *Elrod*, there is no allegation of a strict political test as the sole basis for employment decisions; Cross-Respondents allege only that a "substantial" factor in such decisions are broadly defined "political considerations" which include the use of recommendations from friends or relatives of Republicans. (R.A. 7, ¶ 11f.) Unlike *Elrod*, there is no allegation in this case that any state employee was discharged, or threatened with discharge, with the concomitant disruption of settled expectations. The district court correctly recognized that these distinctions were critical under the *Elrod* analysis, and required the dismissal of all of Cross-Respondents' claims. 641 F. Supp. at 255-56; (C-11).

Likewise, the Seventh Circuit properly discerned that these distinctions required dismissal of Petitioner Moore's hiring claim. The Seventh Circuit reasoned that "rejecting an employment application does not impose a hardship upon an employee comparable to the loss of [a] job." 868 F.2d at 954; (A-24). Moreover, as had the court in *Avery v. Jennings*, 786 F.2d 233 (6th Cir.), *cert. denied*, 477 U.S. 905 (1986), the Seventh Circuit observed that any incidental effect that might flow from the use of political considerations as a basis for non-punitive employment decisions "must be distinguished" from acts of direct retaliation for protected speech. 868 F.2d at 954 n.4; (A-23 n.4). Accordingly, the Seventh Circuit affirmed the dismissal of Petitioner Moore's hiring claim.

Although it recognized that any effect of the alleged use of political considerations in promotion, transfer and rehire decisions was equally incidental, the Seventh Circuit declined to affirm the dismissal of those claims. Rather, the court remanded those claims on the rationale that the

claims could raise a constitutional issue were it demonstrated that the effect of the denial of promotion, transfer and rehire was to "impose the same burden as outright termination." 868 F.2d at 952; (A-17).

A remand for this determination is unnecessary. This Court has recognized that the loss of an existing job solely for partisan reasons "unquestionably" inhibits First Amendment rights. *Elrod*, 427 U.S. at 359. It is equally unquestionable that the mere failure to obtain a desired promotion or transfer is not the equivalent of discharge. Cross-Respondents Rutan and Taylor do not claim that their failure to obtain desired promotions or transfers either resulted in the loss of or in any way adversely affected the terms of their existing employment.

This mere failure to obtain a promotion or transfer thus does not have the same profound effect on First Amendment rights as does a discharge. *Cf. Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1256 n.4 (4th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986) (mere failure to promote is insufficient to result in constructive discharge); *Sparrow v. Piedmont Health Systems Agency, Inc.*, 593 F. Supp. 1107, 1117 (M.D.N.C. 1984) (failure to promote does not provide the basis for constructive discharge). This is particularly evident where, as here, (1) political considerations are not alleged to be the sole basis for the employment decision, and (2) the alleged political considerations do not constitute a strict partisan litmus test, but embrace a variety of factors, including friendship. (R.A. 7, ¶ 11f.) Accordingly, the Seventh Circuit should have affirmed the dismissal of the promotion and transfer claims of Cross-Respondents Rutan and Taylor.

A remand also is unnecessary to determine that the rehiring claims of Cross-Respondents Standefer and O'Brien

fail to state a constitutional claim. As the Seventh Circuit recognized, these claims are even "more straightforward" than the promotion and transfer claims. 868 F.2d at 956; (A-27). Cross-Respondents Standefer and O'Brien do not allege that their separations were in any way motivated by political considerations. Nor do they claim that they had a constitutional right to recall or rehire.

Based on their own allegations, Standefer and O'Brien stood in the position of new applicants for employment, with no pre-existing right to obtain a job. As with the hiring claim of Petitioner Moore, any conceivable burden on the First Amendment interests of Standefer and O'Brien as a result of their failure to obtain rehire or recall "is much less significant than losing a job." 868 F.2d at 952; (A-18). As with the hiring claim of Petitioner Moore, the rehire and recall claims of Standefer and O'Brien fail to state a constitutional claim. Accordingly, the Seventh Circuit should have affirmed the dismissal of those claims.

II.

THE SEVENTH CIRCUIT'S DECISION ON THE PROMOTION, TRANSFER AND REHIRE CLAIMS UNNECESSARILY WOULD INJECT THE COURTS INTO THE POLITICAL PROCESS.

The Seventh Circuit recognized that acceptance of the plaintiffs' arguments would enlist the courts in a campaign to completely purge political considerations from all aspects of the employment process. "[P]laintiffs essentially ask that we constitutionalize civil service and then preside over the system." 868 F.2d at 954; (A-22).

The court also observed, correctly, that such an effort not only would be an "unprecedented intrusion into the political affairs of the states and other branches of federal

government," *id.*, but also would be of doubtful practicality and wisdom (868 F.2d at 954; A-23):

> Banning political considerations from all public service employment decisions, even if practical, would diminish the will of the voters, insert courts into disputes between political factions, and stifle the ability of elected officials to govern. These public policy questions, rife with serious concerns over federalism and—in the case of federal employment—separation of powers, are best left in the political arena.[4]

In remanding the promotion, transfer and rehire claims, the Seventh Circuit failed to give full effect to these problems. The Seventh Circuit agreed that the use of broadly defined political considerations in making promotion, transfer and rehire decisions is not constitutionally forbidden. At the same time, the "substantial equivalent of dismissal" test guarantees that the use of political considerations will embroil government officials in litigation with those disappointed by a promotion, transfer or rehire decision. Because dismissal of such claims may be difficult, public officials will be put to the burden of discovery before they may obtain summary judgment.

And the burden would be substantial. There are some 60,000 persons employed statewide in Illinois who would

[4] The Seventh Circuit has not been alone in this observation. *See Avery v. Jennings*, *supra*, 786 F.2d at 237; *see also Messer v. Curci*, 610 F. Supp. 179, 183 (E.D. Ky. 1985), *appeal pending en banc*, No. 85-5626 (6th Cir.) ("applying the *Elrod* decision to *hiring* would be likely to involve local government officials in numerous lengthy trials concerning the merits of disappointed job seekers"); *Horn v. Kean*, 593 F. Supp. 1298, 1301 (D.N.J. 1984), *aff'd*, 796 F.2d 668 (3d Cir. 1986) (en banc) (absent punitive measures, the principles of *Elrod* "have been applied quite narrowly and have not been employed to curb other patronage personnel actions such as hirings, transfers, reassignments, demotions, and failures to promote").

be implicated by the Seventh Circuit's decision. Unlike termination decisions, which are more limited in number, tens of thousands of decisions are made annually concerning promotion, transfer and rehire. There are at least that many individuals who might be disappointed because they did not receive a desired promotion, transfer or rehire.

Moreover, any benefit to be achieved by imposing this burden would be wholly illusory. Unlike the discharge at issue in *Elrod*, non-punitive employment decisions involving promotion, transfer or rehire do not carry the potential for chilling First Amendment rights. Indeed, even while remanding Cross-Respondents' promotion, transfer and rehire claims, the Seventh Circuit expressed substantial doubt that that such non-punitive employment decisions could be the "substantial equivalent of dismissal." *E.g.*, 868 F.2d at 955; (A-25).

This Court has cautioned that "federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." *Bishop v. Wood*, 426 U.S. 341, 349 (1976). This admonition is particular apt in this case. Under the Seventh Circuit's disposition of the promotion, transfer and rehire claims, the potential for uncontrollable litigation by those allegedly bypassed due to "political considerations" is enormous. Moreover, imposing this burden is not necessary to protect First Amendment rights, especially in the context of promotion, transfer and rehire decisions which are neither punitive nor based solely on political considerations, and which utilize broadly defined "political considerations" that are not strictly partisan.

The promotion, transfer and rehire claims raise "profound questions of political science that exceed judicial competence to answer." *LaFalce v. Houston*, 712 F.2d

292, 294 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984). The Seventh Circuit's remand unnecessarily injects the courts into this political debate.

CONCLUSION

For the foregoing reasons, if this Court grants review of any question presented in No. 88-1872, the Cross-Petition also should be granted.

Respectfully submitted,

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